

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:LA:2:POSTF-113391-02
RLKave

date: June 18, 2002

to: [REDACTED]
Team Coordinator
LMSB, Team [REDACTED] (Glendale)

from: ROGER L. KAVE
Attorney (LMSB)

subject: [REDACTED] - Statute Extension ([REDACTED] - [REDACTED])

This memorandum responds to your request for assistance in preparing the [REDACTED] through [REDACTED] statute extensions for the following discussed entities. The earliest statute date is August 30, [REDACTED]. The statutes will be extended to December 31, [REDACTED]. This memorandum should not be cited as precedent.

Notification of Taxpayer's Rights

As a result of the IRS Restructuring and Reform Act of 1998, the Service must notify the taxpayer on each occasion when the taxpayer is requested to extend the statute by consent as to the following rights:

- a. The right to refuse to extend the limitation period;
- b. The right to request the extension to be limited to particular issues held open for further examination or appeal.
- c. The right to request the limitation period to be limited to a specific date.

I.R.M. § 25.6.22.3(1).

The notification must be made to the taxpayer by: (1) sending or presenting Letter, L-907, and (2) Sending or presenting Publication 1035 (Extending the Tax Assessment Period). *I.R.M. § 25.6.22.3(2).*

ISSUES██████████'s ██████████ and ██████████ Consolidated Returns

(1.) What Form should be used for the ██████████
██████████ and ██████████ consolidated return
consents?

(2.) What taxpayer name should be used on the ██████████ and
██████████ consolidated return consents?

(3.) Whether one multiple year consent can be used to
extend the statute of limitations for the ██████████ and ██████████
██████████ consolidated returns?

(4.) What entity is the proper party to sign the ██████████
and ██████████ consolidated return consents?

(5.) Who can sign the consolidated return consents?

██████████'s ██████████ S Corporation Return

(6.) Whether a ██████████ statute extension is required for
██████████?

(7.) Whether a ██████████ statute extension for ██████████ S
Corporation return also extends the statute for its
subsidiaries?

(8.) What Form should be used for ██████████ statute
extension?

(9.) Who can sign the S corporation consent to extend
the statute?

Employee Stock Ownership Plan ["ESOP"]

(10.) Whether statute extensions should be obtained in
regard to ██████████ ESOP?

██████████, L.L.C. ["██████████"] - ██████████ and
██████████

(11.) Whether ██████████ and ██████████ TEFRA partnership level
consents are required to extend the statute for ██████████'s pass-
thru items?

(12.) If [REDACTED] and [REDACTED] TEFRA partnership level consents are required, what Form should be used to extend the statute?

(13.) If [REDACTED] and [REDACTED] TEFRA partnership level consents are required, what parties should sign the statute extension?

[REDACTED], L.L.C. ["[REDACTED]"] - [REDACTED]

(14.) Whether a [REDACTED] TEFRA partnership level consent is required to extend the statute for [REDACTED]'s pass-thru items?

[REDACTED] - [REDACTED] and [REDACTED]

(15.) What Form should be used to extend the statute of limitations for [REDACTED]'s [REDACTED] and [REDACTED] pass-thru items?

(16.) What parties should sign the statute extension, if [REDACTED], TMP of [REDACTED], is not considered to be a TEFRA partnership?

(17.) What parties should sign the statute extension, if [REDACTED], TMP of [REDACTED], is considered to be a TEFRA partnership?

[REDACTED] - [REDACTED]

(18.) What Form should be used to extend the statute of limitations for [REDACTED]'s [REDACTED] pass-thru items?

(19.) What party should sign the statute extension?

CONCLUSIONS

[REDACTED]'s [REDACTED] and [REDACTED] Consolidated Returns

(1.) We recommend that you use Forms 872-I for the [REDACTED] and [REDACTED] consolidated return consents.

(2.) We recommend the following for the name of the taxpayer to be used on [REDACTED] and [REDACTED] consolidated return consents:

[REDACTED]

Because [REDACTED] name changed during the middle of the [REDACTED] tax year, on the first line of the Form 872-I, the

name of the taxpayer would be "[REDACTED]" (EIN: [REDACTED]), as agent for [REDACTED] (EIN: [REDACTED]) (formerly [REDACTED]) and [REDACTED] consolidated group*"

Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872-I followed by -

* This is with respect to the consolidated federal income tax of [REDACTED] (EIN: [REDACTED]) (formerly [REDACTED]) [REDACTED] consolidated group for the group's taxable year ending [REDACTED].

[REDACTED]

On the first line of the Form 872-I, the name of the taxpayer would be "[REDACTED]" (EIN: [REDACTED]), as agent for [REDACTED] (EIN: [REDACTED]) [REDACTED] consolidated group*"

Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872-I followed by -

* This is with respect to the consolidated federal income tax of [REDACTED] (EIN: [REDACTED]) [REDACTED] consolidated group for the group's taxable year ending [REDACTED].

Verify that [REDACTED]'s EIN remained [REDACTED] in [REDACTED], after its S corporation election.

(3.) Because of the name difference shown above between the [REDACTED] and [REDACTED] consents and because it is sometimes difficult to determine the subsidiary mix of a consolidated group from year to year, we recommend that separate consents be obtained for [REDACTED] and [REDACTED].

(4.) [REDACTED], as common parent of the [REDACTED] and [REDACTED] consolidated group, is the proper party to sign the [REDACTED] and [REDACTED] consolidated group statute extensions. We recommend that the signature block contain only the current name of the common parent, "[REDACTED]," without reference to the subsidiaries. The reference to "formerly [REDACTED]" is not required for the signature block of the [REDACTED] consent.

(5.) The consolidated return consent(s) must be signed by a current duly authorized officer of [REDACTED].

[REDACTED]'s [REDACTED] S Corporation Return

(6.) Although there is no corporate level statute of limitations on non-TEFRA S corporation pass thru items, we recommend that an income tax statute extension be obtained for "[REDACTED]" to protect the statute from expiring in regard to potential corporate level taxes that may be imposed in regard to:

- a. Tax imposed on S corporation built-in gains (I.R.C. § 1374);
- b. Tax imposed on S corporation passive investment income (I.R.C. § 1375); and
- c. Potential C corporation tax if it is later determined that [REDACTED] does not qualify as an S corporation.

(7.) Because the separate existence of QSubs are ignored, [REDACTED]' QSubs are disregarded entities not treated as separate corporations and their assets, liabilities, and items of income, deduction, and credits are treated as those of [REDACTED]. Therefore, a statute extension for "[REDACTED]" covers both [REDACTED] as an S corporation and its related QSubs.

We will need to discuss the statute extension requirements for any [REDACTED] subsidiary for which [REDACTED] did not make a QSub election.

(8.) Because [REDACTED] in [REDACTED] is considered to be a direct partner in [REDACTED], a TEFRA partnership, we recommend that you use Form 872-I for the [REDACTED] corporate level consent.

(9.) The S corporation consent must be signed by a current duly authorized officer of [REDACTED].

Employee Stock Ownership Plan ["ESOP"]

(10.) Although it appears that [REDACTED] and its ESOP are exempt from flow thru income tax in [REDACTED], we recommend that you bring in a TE/GE revenue agent to assist in obtaining consents to extend the statute for any potential Chapter 43 excise tax

that may be due from either [REDACTED], its subsidiaries or the ESOP. A TE/GE attorney from our office is also available to assist the TE/GE agent.

[REDACTED], L.L.C. ["[REDACTED]"] - [REDACTED] and [REDACTED]

(11.) & (12.) Because [REDACTED] meets the small partnership requirements, it must be treated as a small partnership (a non-TERFA partnership), unless it can be shown that [REDACTED] specifically elected to be treated under the TEFRA unified proceeding provisions.

Because [REDACTED] responded positively to the consolidated audit procedures question on its [REDACTED] return and designated a TMP on its [REDACTED] and [REDACTED] returns, it should be verified in writing that there was no intent that [REDACTED] be treated as a TEFRA partnership and that no election was filed electing TEFRA treatment for [REDACTED]. Written verification would need to be signed by all three [REDACTED] partners and by [REDACTED] (as common parent of the partners' consolidated group).

Pending written verification, you should obtain a Form 872-P for [REDACTED] and [REDACTED].

(13.) We recommend that both [REDACTED] and the TMP sign the Form 872-P. We recommend both signatures even if the same individual is the duly authorized officer of both signing entities. (See Signature Block Example under Law and Analysis).

The signor for [REDACTED] must be a current duly authorized officer of [REDACTED] and the signor for [REDACTED] must be a current duly authorized officer of [REDACTED].

[REDACTED], L.L.C. ["[REDACTED]"] - [REDACTED]

(14.) Because a return was not filed for [REDACTED] in [REDACTED], we presume that [REDACTED] is a disregarded entity. Therefore, a [REDACTED] statute extension (Form 872-P) is not required for [REDACTED].

[REDACTED] - [REDACTED] and [REDACTED]

(15.) Pending written verification as to whether [REDACTED] is a TEFRA partnership, you will need to obtain two sets of Forms 872-P for [REDACTED]. One set to be signed treating [REDACTED] as a

non-TEFRA partnership and the other set to be signed treating [REDACTED] as a TEFRA partnership.

(16.) See the discussion under Law and Analysis for the signature block to be used, if [REDACTED], TMP of [REDACTED], is not considered to be a TEFRA partnership.

(17.) See the discussion under Law and Analysis for the signature block to be used, if [REDACTED], TMP of [REDACTED], is considered to be a TEFRA partnership.

[REDACTED] - [REDACTED]

(18.) Form 872-P should be used to extend the statute for [REDACTED]'s [REDACTED] tax year.

(19.) Because [REDACTED] holds a direct partnership interest in [REDACTED] based upon the QSub election for [REDACTED] and [REDACTED] was designated as the TMP on [REDACTED]'s [REDACTED] Form 1065, [REDACTED] should sign [REDACTED]'s [REDACTED] Form 872-P as follows:

[REDACTED] by [name of authorized representative for [REDACTED], title of authorized representative], Tax Matters Partner of [REDACTED]

The signor for [REDACTED] must be a current duly authorized officer of [REDACTED].

General Comment Regarding Authority to Sign Statute Extensions

You requested whether it would be appropriate for [REDACTED] to sign all of the statute extensions to be secured. [REDACTED] is a Vice President and Assistant Treasurer of [REDACTED].

All of the consents must be signed by a duly authorized person of the particular entity on whose behalf the person is signing. As an example, if [REDACTED] is signing in his capacity as an officer of [REDACTED], he must be authorized by the [REDACTED] Board of Directors to act in such capacity. If [REDACTED] is going to sign as an officer of [REDACTED], he must be authorized by the Board of Directors of [REDACTED] to act in such capacity. [REDACTED] Board of Directors cannot authorize an officer to sign on behalf of [REDACTED].

FACTS

Since our conclusions are dependent upon the following factual recitation, it is imperative that you verify the following stated facts.

[REDACTED]

For [REDACTED] and [REDACTED], [REDACTED] ["[REDACTED]"] filed consolidated corporate federal income tax returns for the periods ending [REDACTED], and [REDACTED], respectively. [REDACTED] filed as a C corporation and common parent of the consolidated group.

[REDACTED] changed its name from "[REDACTED]" to "[REDACTED]" on [REDACTED]. Although the name under which the [REDACTED] consolidated income tax return was filed is "[REDACTED]," the name shown for the common parent on the return's affiliations schedule is "[REDACTED] (Formerly [REDACTED])."

The name under which the [REDACTED] consolidated income tax return was filed is "[REDACTED]."

On [REDACTED], [REDACTED] filed Form 2553, "Election by a Small Business Corporation," through which [REDACTED] elected Subchapter S status. At the same time, [REDACTED] made Qualified Subchapter S elections for certain wholly owned domestic subsidiaries, as described under Code § 1361(b)(3)(B).

As an S Corporation, [REDACTED] did not file a [REDACTED] consolidated tax return. Because it elected to have certain subsidiaries treated as Qualified Subchapter S Subsidiaries ["QSubs"], the subsidiaries are not treated as separate corporations. The QSubs assets, liabilities, and items of income, deductions and credits are treated as those of [REDACTED].

[REDACTED] S corporation tax return states the name of the company as "[REDACTED]" and the [REDACTED] return covered the period of [REDACTED] through [REDACTED].

The statute for the [REDACTED] consolidated return expires on December 31, [REDACTED]. Two statute extensions for [REDACTED] were previously obtained expiring on September 15, [REDACTED] and December 31, [REDACTED], respectively. Both statute extensions were

obtained via Forms 872.

The taxpayer's name used on both of the [REDACTED] statute extensions was "[REDACTED]" and the corporate name shown in each signature block was "[REDACTED] Corporation & Subsidiaries."

Statute extensions have not been obtained regarding [REDACTED] and [REDACTED] tax years. [REDACTED] consolidated return was signed on September 14, [REDACTED], and its S corporation return was signed on September 15, [REDACTED].

Since [REDACTED], all of [REDACTED] common stock has been owned by its employee stock ownership plan ["ESOP"].

[REDACTED] L.L.C.

[REDACTED] L.L.C. ["[REDACTED]"] was incorporated in [REDACTED] as a [REDACTED] limited liability company. Paragraph [REDACTED] of [REDACTED]'s articles of association, filed at the time of incorporation, provides that

[REDACTED]

Paragraph [REDACTED] of the articles of association further provides that "[REDACTED]
[REDACTED]. " A Member is defined in paragraph [REDACTED] of the articles as "[REDACTED]
[REDACTED]. "

The articles of association also provide in paragraph [REDACTED] that the "[REDACTED]
[REDACTED]. "

██████ filed partnership returns, Forms 1065, for ██████¹ and ██████.² ██████'s ██████ return was its final return.

The owners of ██████ are as follows:

<u>Partners</u>	<u>Entity Type</u>	<u>Interest</u>
██████, Inc. for ██████	Corporation	█████%
██████, formerly ██████, Inc. for ██████	Corporation	█████%
██████, Inc.	Corporation	█████%
██████, Inc.	Corporation	█████%

All three partners in ██████ are wholly owned subsidiaries of ██████ and until ██████' S corporation election, were part of the ██████ consolidated group. They are each limited liability company members of ██████.

██████ designated ██████, Inc. as its Tax Matters ██████ ["TMP"] for ██████ and ██████ (formerly ██████, Inc.) as its TMP for ██████.

A Lexus search of the ██████'s corporate records revealed that ██████ was incorporated on ██████. On ██████, ██████ changed its name to ██████ Inc.. On ██████, ██████, Inc. changed its name back to ██████.

██████'s articles of association filed ██████

¹Fiscal period ██████ through ██████

²Fiscal period ██████ through ██████

shows [REDACTED], Inc. as a member of [REDACTED].

[REDACTED] Form 1120 Sub S Election Report reflects an EIN of [REDACTED] for [REDACTED], Inc. and that [REDACTED], Inc. was incorporated as an [REDACTED] corporation on [REDACTED]. [REDACTED] QSub election report does not reflect a name change for [REDACTED], Inc. back to [REDACTED].

[REDACTED]'s [REDACTED] and [REDACTED] schedules K-1 reflect an EIN of [REDACTED] for [REDACTED], Inc. and [REDACTED] (formerly [REDACTED], Inc.). A member of [REDACTED] tax department has represented to Exam that the K-1 EIN was entered in error and that the correct EIN is [REDACTED].

This is all to be distinguish from [REDACTED] which was incorporated on [REDACTED] and does not appear to have been a [REDACTED] partner. [REDACTED] changed its name to [REDACTED], Inc. on [REDACTED] and back to [REDACTED] on [REDACTED]. [REDACTED] finally changed its name to [REDACTED] on [REDACTED].³

Two separate Forms 872-P were secured for [REDACTED] with each extending the statute for [REDACTED] until September 15, [REDACTED]. The first Form 872-P was signed by [REDACTED] fka [REDACTED], Inc., the Tax Matters Partner. The second Form 872-P was signed by [REDACTED], parent of [REDACTED].

No statute extension has been secured for [REDACTED]'s [REDACTED] tax return. The [REDACTED] return was signed on [REDACTED].

Exam believes that because of the small partnership exception, the audit of [REDACTED]'s [REDACTED] and [REDACTED] partnership returns are not subject to the TEFRA audit procedures.

[REDACTED]'s [REDACTED] return indicated that [REDACTED] was subject to the consolidated audit procedures of I.R.C. sections 6221 through 6233 and designated [REDACTED], as the TMP. This was reflected by the statements shown on Schedule B of the [REDACTED]

³ [REDACTED] Form 1120 Sub S Election Report reflects an EIN of [REDACTED] for [REDACTED] and that [REDACTED] was incorporated as an [REDACTED] corporation on [REDACTED].

Form 1065. [REDACTED]'s [REDACTED] return indicated on Schedule B that [REDACTED] was not subject to the TEFRA procedures of I.R.C. §§ 6221 through 6233 but still designated [REDACTED] (formerly [REDACTED], Inc.) as its TMP.

Exam alleges that an appropriate "formal" election to be treated as a TEFRA partnership was never filed for [REDACTED] or [REDACTED].

Attached to [REDACTED]'s Form 1065 for [REDACTED] was the following statement:

[REDACTED]

A [REDACTED] Form 1065 was not filed for [REDACTED] because of the QSub elections for [REDACTED]'s three partners.

[REDACTED]

[REDACTED] filed partnership returns, Forms 1065, for [REDACTED],⁵

⁴It is our understanding that [REDACTED]'s correct EIN is [REDACTED].

⁵Fiscal period [REDACTED] through [REDACTED].

██████████,⁶ and ██████████.⁷

The owners of ██████████ are as follows:

<u>Partner</u>	<u>Entity Type</u>	<u>Interest</u>
██████████ (██████████) Limited	Partnership	██████████%
██████████	LLC/Partnership	██████████%
██████████ ["██████████"]	Foreign Corp.	██████████%
		██████████%

██████████, a foreign partnership, and ██████████, a foreign corporation located in ██████████, are unrelated to ██████████.

Schedules B of the ██████████, ██████████ and ██████████ Forms 1065 indicate that TEFRA audit procedures apply and, in regard to the ██████████ and ██████████ returns, ██████████ was designated as the TMP. ██████████ was designated as the TMP for ██████████.

Three separate Forms 872-P were secured for ██████████ with each extending the statute for ██████████ until September 15, ██████████. The first Form 872-P was signed by ██████████, TMP of ██████████. The second Form 872-P was signed by ██████████ fka ██████████, TMP of ██████████. Finally, the third Form 872-P was signed by ██████████, Parent of ██████████.

No statute extensions have been secured for the ██████████ and ██████████ partnership returns. ██████████'s ██████████ return was signed on ██████████, and its ██████████ return was signed on ██████████.

The following statement was attached to the ██████████ return of ██████████:

⁶Fiscal period ██████████ through ██████████
 ██████████.

⁷Fiscal period ██████████ through ██████████
 ██████████.

On [REDACTED], [REDACTED] filed Form 2553, "Election by a Small Business Corporation," through which [REDACTED] elected Subchapter S status. At the same time, [REDACTED] made Qualified Subchapter S Subsidiary ("QSub") elections for certain wholly owned domestic subsidiaries, as described under § 1361(b)(3)(B) of the Internal Revenue Code of 1986, as amended. These included all three owners of [REDACTED] L.L.C. ("[REDACTED]"). Following these QSub elections, all assets, liabilities, and items of income, deduction and credits of [REDACTED] became those of [REDACTED] for income tax purposes. As such, [REDACTED] is now a [REDACTED]% owner in [REDACTED].

LAW AND ANALYSIS

[REDACTED]'s [REDACTED] and [REDACTED] Consolidated Returns

We recommend that you use Forms 872-I for [REDACTED] [REDACTED] and [REDACTED] consolidated return consents.

The consents should be prepared in the name of the parent corporation with reference to the affiliated companies. An extension filed in the parent's name only is not sufficient to bind the subsidiaries, regardless of the fact that they filed a consolidated return. I.R.M. § 25.6.22.6.2.1

We recommend the following for the name of the taxpayer to be used on [REDACTED] [REDACTED] and [REDACTED] consolidated return consents:

[REDACTED]

Because [REDACTED] name changed during the middle of the [REDACTED] tax year, on the first line of the Form 872-I, the name of the taxpayer would be "[REDACTED] (EIN: [REDACTED])", as agent for [REDACTED] (EIN: [REDACTED]) (formerly [REDACTED]) and [REDACTED] consolidated group*"

Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872-I followed by -

* This is with respect to the consolidated federal income tax of [REDACTED] (EIN: [REDACTED]) (formerly [REDACTED])

consolidated group for the group's taxable year ending [REDACTED].

[REDACTED]

On the first line of the Form 872-I, the name of the taxpayer would be "[REDACTED] (EIN: [REDACTED]), as agent for [REDACTED] (EIN: [REDACTED]) [REDACTED] consolidated group*"

Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872-I followed by -

* This is with respect to the consolidated federal income tax of [REDACTED] (EIN: [REDACTED]) [REDACTED] consolidated group for the group's taxable year ending [REDACTED].

Verify that [REDACTED]'s EIN remained [REDACTED] in [REDACTED], after its S corporation election.

A single consolidated return consent for more than one year may be obtained only when the parent and subsidiary corporations are identical in the years covered. I.R.M. § 25.6.22.6.2.1 Because it is sometimes difficult to determine the subsidiary mix of a consolidated group from year to year and because of the difference in names to be used on the [REDACTED] and [REDACTED] consents, we recommend that separate consents be obtained for [REDACTED] and [REDACTED].

Treasury Regulation § 1.1502-77(a) provides in part that the common parent is the proper party to sign income tax consents for all members in the consolidated group. [REDACTED] [REDACTED], as common parent of the [REDACTED] and [REDACTED] consolidated group, is the proper party to sign the [REDACTED] and [REDACTED] consolidated group statute extensions. We recommend that the signature block contain only the current name of the common parent, "[REDACTED]," without reference to the subsidiaries. The reference to "formerly [REDACTED] [REDACTED]" is not required for the signature block of the [REDACTED] consent.

The regulations under I.R.C. § 6501(c)(4) do not specify who may actually sign consents executed under that section. Accordingly, the Service applies the rules applicable to the execution of the original returns to the execution of consents

to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. In the case of corporate returns, I.R.C. § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act.

The consolidated return consent(s) must be signed by a current duly authorized officer of [REDACTED].

[REDACTED]'s [REDACTED] S Corporation Return

On [REDACTED], [REDACTED] filed Form 2553, "Election by a Small Business Corporation," through which [REDACTED] elected Subchapter S status for the [REDACTED] tax year. As an S Corporation, [REDACTED] is prohibited from filing a consolidated tax return with its subsidiaries. H.R. Rep. No. 586, 104th Cong., 2d Sess. 88 (1996).

[REDACTED] made QSub elections for certain [REDACTED] subsidiaries at the time of [REDACTED] election to become an S corporation.

Under Internal Revenue Code § 1361(b)(3), a corporation that is a QSub is not treated as a separate corporation and all assets, liabilities, and items of income, deduction, and credit of a QSub are treated as assets, liabilities, and such items (as the case may be) of the S corporation. Section 1361(b)(3)(B) defines a QSub as any domestic corporation that is not an ineligible corporation⁸ if (i) 100 percent of the stock of such corporation is held by the S corporation and (ii) the S corporation elects to treat such corporation as a QSub. Treasury Regulation § 1.1361-4 (a) states that the separate existence of a QSub is ignored for Federal tax purposes.

Because the separate existence of a QSub is ignored, [REDACTED] QSubs are disregarded entities not treated as separate

⁸ An "ineligible corporation" means any corporation which is: (1) a financial institution which uses the reserve method of accounting for bad debts described in § 585; (2) an insurance company subject to tax under sub-Chapter L; (3) a corporation to which an election under § 936 applies; or (4) a DISC or former DISC. I.R.C. §1361(b)(2).

corporations and their assets, liabilities, and items of income, deduction, and credits are treated as those of [REDACTED].

Therefore, a statute extension for [REDACTED] covers both [REDACTED] as an S corporation and its related QSubs.

We will need to discuss the statute extension requirements for any [REDACTED] subsidiary for which [REDACTED] did not make a QSub election.

There is no statute of limitations on an S corporation return for pass thru items to the shareholders, if the S corporation is non-TEFRA. The statute of limitations is determined at the shareholder level for each shareholder. Because S Corporations for taxable years beginning after [REDACTED] are not covered by the TEFRA uniform audit procedures, [REDACTED] is a non-TEFRA S corporation. Thus, the statute for each shareholder is extended by following the consent procedures for the individual or entity shareholder returns.

Where there is potential for tax on the S corporation itself, then the statute must be protected at the S corporation level. Tax due at the S corporation level can occur in the following situations:

- a. Tax imposed on S corporation built-in gains (I.R.C. § 1374);
- b. Tax imposed on S corporation passive investment income (I.R.C. § 1375); and
- c. If the corporation has filed as an S corporation, but it is later determined that it does not qualify as an S corporation, it will be converted to a C corporation. The statute of the converted C corporation begins with the filing of the S corporation return. If there is a potential that the S corporation will be converted to a C corporation, the statute must be protected.

We recommend that an "income" tax statute extension be obtained for "[REDACTED]" to protect the statute from expiring in regard to the above potential corporate level taxes.

Because [REDACTED], in [REDACTED], is considered to be a direct partner in [REDACTED], a TEFRA partnership, we recommend that you use Form 872-I for the [REDACTED] corporate level consent.

The "[REDACTED]" consent must be signed by a current duly authorized officer of [REDACTED].

Employee Stock Ownership Plan ["ESOP"]

Since [REDACTED], all of [REDACTED] common stock has been owned by its ESOP. An ESOP counts as one shareholder for purposes of determining the number of shareholders in an S corporation.

Items of income or loss do not flow through from S corporations to ESOP shareholders as unrelated business taxable income.⁸ I.R.C. § 512(e)(3). Therefore, because [REDACTED] is [REDACTED]% owned by its ESOP, [REDACTED] S corporation flow thru income remains untaxed at both the corporate and shareholder level.

Although it appears that [REDACTED] and its ESOP are exempt from flow thru income tax in [REDACTED], we recommend that you bring in a TE/GE revenue agent to assist in obtaining consents to extend the statute for any potential Chapter 43 excise tax that may be due from either [REDACTED], its subsidiaries or the ESOP.⁹ A TE/GE attorney from our office is also available to assist the TE/GE agent.

⁸Generally, if a qualified retirement plan trust described in I.R.C. § 401(a) and exempt from taxation under I.R.C. § 501(a) holds stock in an S corporation, the interest is treated as an interest in an unrelated trade or business and the items of income, loss, deduction or credit of the S corporation that flow thru to the tax-exempt shareholder and any gain or loss on the disposition of the S corporation stock are taken into account in calculating the exempt organization's "unrelated business taxable income." I.R.C. §§ 512(e)(1)(A) and (B). Internal Revenue Code § 512(e)(3) provides a special exception and exempts ESOPs from treating the pass-thru income as unrelated trade or business income.

⁹Consideration should also be given to obtaining a consent to extend the statute for potential unrelated business tax due from the ESOP, should it ultimately be determined that the ESOP does not qualify for the § 512(e)(3) exclusion.

████████████████████ L.L.C. ["████████"]

████████ - ██████████ and ██████████

Small partnerships are not subject to the TEFRA unified proceedings unless they elect to be subject to them. For taxable years 1982 through 1996, I.R.C. § 6231(a)(1)(B)(i) defines a "small partnership" as a partnership in which:

- a. there are ten or fewer partners;
- b. each partner is a natural person (not a nonresident alien) or an estate; and
- c. each partner's share of each partnership item is the same as his or her share of every other partnership item.

For taxable years ending after August 5, 1997, I.R.C. § 6231(a)(1)(B) has been amended to provide that the same share requirement is no longer applicable and C corporations are allowed as partners in addition to natural persons.

The small partnership exception still does not apply to a partnership for a taxable year if any partner in the partnership during that taxable year is a pass-thru partner (i.e. a partnership). *Treas. Reg. § 301.6231(a)(1)-1(a)(2).*

The determination of whether a partnership meets the requirements for the exception for small partnerships is to be made with respect to each partnership taxable year. Thus, a partnership that does not qualify as a small partnership in one taxable year may qualify as a small partnership in another taxable year if the requirements for the exception under section 6231(a)(1)(B) are met with respect to that other taxable year. *Treas. Reg. §§ 301.6231(a)(1)-1(a)(3).*

Any partnership that meets the small partnership requirements is treated as a small partnership, unless it specifically elects to be treated under the TEFRA unified proceeding provisions. *I.R.C. § 6231(a)(1)(B)(ii).* The election is effective for the partnership taxable year to which the return relates and all subsequent partnership taxable years unless the election is revoked with the consent of the Commissioner. *Id.*

The election provided for in section 6231(a)(1)(B)(ii) is made by attaching a statement to the partnership return for the first taxable year for which the election is to be effective. *Treas. Reg. § Sec. 301.6231(a)(1)-1(b)(2)*. The regulations also require that the statement be identified as an election under section 6231(a)(1)(B)(ii), be signed by each person who was a partner at any time during the taxable year to which the return relates, and be filed at the time (determined with regard to any extension of time for filing) and place prescribed for filing the partnership return. However, for any partnership taxable year for which the due date of the return (determined without regard to extensions) is before January 2, 2002, the partnership may file the statement described in the preceding sentence on or before the date which is one year before the expiration of the period of limitations for assessment of tax under I.R.C. § 6229(a), including extensions by agreement provided for under I.R.C. § 6229(b).

Although not citeable authority, the Service's Partnership Audit Techniques Guide provides:

[c]hecking the 'yes' box on page 2 of Form 1065 which asks the question, 'Is this partnership subject to the consolidated audit procedures of section 6221 through 6234?,' does not constitute a proper election. Nor does the designation of a TMP, in and of itself, constitute a proper election.

Partnership Audit Techniques Guide, Ch.13, pg. 13-3.

The Audit Guide further provides that in instances where the partnership would not appear to qualify as a TEFRA entity, but designates a TMP on the tax return or responds positively to the consolidated audit procedures question, inquiry should be made as to whether there is an election in effect. *Id.* The examiner should secure the partnership's file copy of the election and determine if the election is valid under the Treasury Regulations. *Id.*

██████ has only three partners which are each domestic C corporations. Since the return years at issue (██████ and ██████) end after August 5, 1997, the corporate partners no longer prevent ██████ from meeting the small partnership exception. Because ██████ meets the small partnership requirements, it must be treated as a small partnership, unless it can be shown that ██████ specifically elected to be treated under the TEFRA unified

proceeding provisions.

Because [REDACTED] responded positively to the consolidated audit procedures question on its [REDACTED] return and designated a TMP on its [REDACTED] and [REDACTED] returns, it should be verified in writing that there was no intent that [REDACTED] be treated as a TEFRA partnership and that no election was filed electing TEFRA treatment for [REDACTED]. Written verification would need to be signed by all three [REDACTED] partners and by [REDACTED] (as common parent of the partners' consolidated group). Although we believe that indicating an entity is subject to TEFRA on a return and designating a TMP is not sufficient for a small partnership to make an election to be subject to TEFRA, we believe obtaining the subject verification is the prudent course of action.

If [REDACTED] indicates that it intended for TEFRA to apply, that written verification would not qualify as an election under Treas. Reg. section 301.6231(a)(1)-1(b)(2), unless there is one year remaining on the TEFRA period of limitations or unless [REDACTED] had previously submitted a written statement on a timely basis.

Pending written verification, you should obtain a Form 872-P for [REDACTED] and [REDACTED] that is signed by both [REDACTED] and the TMP.¹⁰ The signature block should appear as follows (providing for two signatures):

[REDACTED] by [name of authorized representative for [REDACTED], title of authorized representative], as agent of [REDACTED] formerly [REDACTED], Tax Matters Partner of

¹⁰The reason that we recommend that the parent sign all consents on behalf of its consolidated group subsidiaries is because Treas. Reg. § 1.1502-77 provides that the common parent shall be the "sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year." Thus, under the regulations, the parent of a consolidated filing group acts on behalf of the group with respect to all tax matters. In this regard, it is the parent who must extend the period of limitations on behalf of the consolidated group with respect to the consolidated return. Such consent "shall be considered as having also been given or executed by each such subsidiary." *Id.*

██████ - █████ and █████

Where the TMP of the source partnership (██████) is also a partnership/LLC (██████), the question arises, who can act for the second tier partnership in its capacity as the TMP of the source partnership.

Pending written verification as to whether █████ is a TEFRA partnership, you will need to obtain two sets of Forms 872-P for █████. One set to be signed treating █████ as not being a TEFRA partnership and the other set to be signed treating █████ as a TEFRA partnership.

If █████, TMP of █████, is not considered to be a TEFRA partnership

If █████ is not a TEFRA partnership, then a determination is required as to who may bind █████ as TMP of █████.

██████ was incorporated in █████ under the laws of the █████ as a limited liability company. Paragraph █████ of █████'s original articles of association provides that the members of █████ shall have full, complete, and exclusive authority to manage and control █████'s business affairs and to buy, sell and borrow on behalf of █████ and to perform all other acts or activities customary or incidental thereto. Paragraph █████ of the articles of association further provides that no member may delegate any powers and duties to other persons.

Based upon █████'s articles of association, █████, as a member of █████, can bind █████ as TMP of █████.

We recommend that █████'s █████ and █████ Form 870-P be signed by duly authorized officers of █████ and █████ as follows:

████████████████████ by [name of authorized representative for ████████████████████, title of authorized representative], as agent of ████████████████████

⁸Again, because ████████████████████ (formerly ████████████████████) was a member of the ████████████████████ consolidated group for █████ and █████, respectively, ████████████████████, as the common parent, should also sign the consent.

formerly [REDACTED], member of [REDACTED]
[REDACTED], Tax Matters Partner of [REDACTED]

[REDACTED] by [name of authorized
representative for [REDACTED], title of
authorized representative], formerly [REDACTED]
[REDACTED], member of [REDACTED], L.L.C.,
Tax Matters Partner of [REDACTED]

Because [REDACTED]'s articles of association also provide for the appointment of officers, you should have the taxpayer verify in writing that [REDACTED]'s articles of association have not been changed and still provide that [REDACTED] as a member of [REDACTED], is authorized to bind [REDACTED]. If this is not the case, contact us to determine what further action needs to be taken.

If [REDACTED], TMP of [REDACTED], is considered to be a TEFRA partnership

When the second tier partnership designates its own TMP, we will accept that as an authorization to have that partner also act on behalf of the second tier as the TMP for the source partnership. If a statute extension is executed by a partner of the second tier partnership, the document must expressly provide that the partner is signing in a representative capacity.

Because [REDACTED] was designated as [REDACTED]'s TMP for [REDACTED] and [REDACTED] (formerly [REDACTED]) was designated as [REDACTED]'s TMP for [REDACTED], we recommend that [REDACTED]'s Forms 870-P be signed by duly authorized officers of [REDACTED] as follows:

[REDACTED] by [name of authorized representative
for [REDACTED], title of authorized
representative], as agent of [REDACTED]
formerly [REDACTED], Tax Matters Partner of
[REDACTED], L.L.C., Tax Matters
Partner of [REDACTED]

[REDACTED] by [name of authorized
representative for [REDACTED], title of
authorized representative], formerly [REDACTED]
[REDACTED], Tax Matters Partner of [REDACTED]

[REDACTED], L.L.C., Tax Matters Partner of [REDACTED]

The signor for [REDACTED] must be a current duly authorized officer of [REDACTED] and the signor of [REDACTED] must be a current duly authorized officer of [REDACTED].

[REDACTED] - [REDACTED]

Because [REDACTED] is considered to hold a direct partnership interest in [REDACTED] based upon the QSub election for [REDACTED] and [REDACTED] was designated as the TMP on [REDACTED]'s [REDACTED] Form 1065, [REDACTED] should sign [REDACTED]'s [REDACTED] Form 872-P as follows:

[REDACTED] by [name of authorized representative for [REDACTED], title of authorized representative], Tax Matters Partner of [REDACTED]

The signor for [REDACTED] must be a current duly authorized officer of [REDACTED].

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

ROGER L. KAVE
Attorney (LMSB)